Supreme Court, U.S.
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No. 95-763

In The

Supreme Court of the United States

October Term, 1995

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

LARRY D. VANCE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

WALLACE R. STEFFEN
330 Standard Building
1370 Ontario Avenue
Cleveland, Ohio 44113
216/771-7171

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF QUESTIONS PRESENTED

Does the decision of the Supreme Court of Ohio in *Vance v. Consolidated Rail Corporation* (1995), 73 Ohio St.222, 652 N.E.2d 776, rest on any proposition of law which creates an actual conflict with the decision of The Supreme Court of the United States in *Consolidated Rail Corporation v. Gottshall* (1994), 512 U.S. ___, 114 S. Ct. 2396, 129 L. Ed. 2d 427?

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APPENDIX

Copy of photograph of "chipping" hammer which was trial exhibit No. 2 ..... Appx.B.1

Federal Employers' Liability Act, 45 U.S.C. Sec. 51, et seq Appx.B.2

Respondent, Larry D. Vance, respectfully requests that this Court deny the petition for writ of certiorari of Petitioner, Consolidated Rail Corporation, which seeks review of the Supreme Court of Ohio opinion below.

That opinion is reported in *Vance v. Consolidated Rail Corporation*, 73 Ohio St.3d 222, 652 N.E.2d 776 (1995) and is reprinted at Appendix A.1 to the petition for writ of certiorari.

Petitioner's appendices are identified herein with the prefix "A".

Rrespondent's appendices are identified herein with the prefix "B".

RESTATEMENT OF THE CASE

The gravamen of this action is set forth in the following paragraphs 1 and 5 of the Complaint of plaintiff-respondent, Larry Vance, a former railroad employee of defendant-petitioner, Consolidated Rail Corporation ("Conrail").

> "This suit is brought under the Federal Employers' Liability Act (45 U.S.C., Sec. 51, et seq.) The action arises out of the failure of Defendant Railroad, Consolidated Rail Corporation, to provide Plaintiff, Larry Vance, with a safe place to work. Defendant Railroad negligently caused and inflicted upon Plaintiff severe emotional distress, anxiety, and depression. This caused disabling, psychological harm, and accompanying physical harm."

* * *

> "The severe emotional distress and resulting injury were directly and proximately caused by Defendant Railroad. It negligently supervised and condoned the known conduct of Plaintiff's superiors and fellow employees who in the process of making work assignments and in other word related associations, subjected Plaintiff to torment, embarrassment, humiliation, frustration, harassment, inequity, ridicule, and other, severe emotional distress, because he was a former employee of Erie Lackawanna Railroad. This outrageous conduct throughout Plaintiff's employment relationship ultimately caused Plaintiff's said emotional breakdown and disqualification from his job, all of which was reasonably foreseeable by Defendant Railroad."

After 5 days of trial, the jury returned a general verdict for Vance finding that Conrail, did not provide Vance a safe place to work under the Federal Employers' Liability Act ("FELA") because of its negligence in permitting and perpetuating a hostile and abusive workplace environment to flourish.

This continuing negligence resulted in unbridled, "unconscionable abuse" to Vance, a former Erie Lackawanna Railway employee, by rival Conrail employees who had previously worked for Penn Central Railroad and who comprised the vest majority of the Conrail workforce.

The "unconscionable abuse" cumulatively resulted in suffering what was first diagnosed in August, 1987, as a disabling, chronic depression and was acknowledged as such by Conrail who disqualified him from work.

At that time, treatment of Vance required ten electric shock treatments and he remains on heavy doses of anti-depressant medication to prevent self, life-depriving efforts.

The unconscionable abuse Vance suffered *included* the following "zone of danger"[1] threats of being placed in immediate risk of physical harm by abusive Conrail employees:

1. The immediate physical threat of being killed by being hit on the top of his head with a raised and poised-to-strike, steel pointed "chipping" hammer, which threat made Vance tremble in fear for ten minutes. A copy of a photograph of the ten-inch long "chipping" hammer (Plaintiff's Exhibit No. 2 is attached as Appx. B. 1.)

2. The immediate physical threat of being run-over by a truck by an employee who said he was merely trying to "put a scare" in Vance – which he did.

3. The physical contact and shoving of Vance in the railyard in an effort to intimidate him and attempt to start a fight which Vance didn't want. (Conrail's Petition for Writ of Certiorari, pages 6 & 7)

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[1] Under the zone of danger test, recovery for emotional injury is limited "to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct *or* who are placed in immediate risk of physical harm by that conduct." *Consolidated Rail Corporation v. Gottshall* (1995), 114 S. Ct. 2396, at 2406; *Vance v. Consolidated Rail Corporation*, 73 Ohio St.3d 222, at 228.

Examples of the type of some of the other "unconscionable abuses" which were routinely suffered by Vance are described on Appx. "A. 3" to App."A. 5".

In its opening statement to the jury, Conrail stated that Vance's injury which was the subject of Vance's claim, was a serious injury and that the seriousness of the injury was not in issue.

Upon Conrail's request, the jury was instructed on the necessity of Vance showing "unconscionable abuse" as an element of his claim.

The jury returned a general verdict for Vance. Special written interrogatories to the jury were not requested and the parties agreed to a general verdict.

The trial court denied Conrail's motions for a directed verdict and for judgment notwithstanding the verdict. Conrail appealed the denial of these motions.

The Court of Appeals of Ohio made the following finding regarding the controlling issues in *Vance* in its November 10, 1993 Opinion:

> "We find that the controlling issues on appeal are whether plaintiff [Vance] can maintain a negligent infliction of emotional distress claim under the FELA, and whether he proved railroad negligence required by the Act." (Appx. A. 42)

At the highest state court level, the Supreme Court of Ohio, guided by the *Gottshall* "zone of danger" test, found in *Vance*, supra, 73 Ohio St.3d 222, that:

1. Vance has a cognizable emotional distress cause of action under F.E.L.A. (Appx. A.

12-15). "[P]laintiff was in the zone of danger, and so satisfies the threshold *Gottshall* test placing him within the class of plaintiffs who may recover for negligent infliction of emotional distress under the FELA . . . " (Appx. A. 15)

2. Vance had also met the burden of showing "unconscionable abuse."[2] (Appx. A. 19)

3. Vance had also met his burden of proving that Conrail failed in its duty to provide him with a safe workplace. (Appx. A. 17-18)

4. There was sufficient medical evidence to establish that Vance "was suffering from a chronic and disabling depression." (Appx. A. 16)

5. There was sufficient evidence of the traditional common law elements of negligence to create a jury question. (Appx. A. 17-21)

6. Conrail's motions for directed verdict and judgment notwithstanding the verdict were correctly overruled by the trial court. (Appx. A. 21)

A more derailed summary of these findings were presented in the concurring opinion of Judge Wright in *Vance,* supra, 73 Ohio St.3d, at 240. (Appx. A. 32-33)

The Supreme Court of Ohio reversed the Court of Appeals of Ohio (8th District) which had reversed the jury verdict and judgment for Vance, and has remanded

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[2] "Unconscionable abuse" was first alluded to by this Court as a cognizable basis for a FELA emotional distress claim in *Atchison, Topeka and Santa Fe Ry. v. Buell* (1987), 107 S. Ct. 1410, at 1417, n.13.

the case to the Court of Appeals of Ohio to address certain assignment of errors which had been temporarily set aside and had not yet been addressed by the Court of Appeals.

REASONS FOR DENYING THE WRIT

This Court should deny the petition for a writ of certiorari because the verdict and judgment for Vance as affirmed by the Supreme Court of Ohio (A. 1-33) is not in conflict with this Court's decision in *Consolidated Rail Corporation v. Gottshall* (1994), 512 U.S. ___, 114 S. Ct. 2396, 129 L. Ed. 2d 427.

F.E.L.A. emotional distress law which is applicable to the *Vance* case, supra, evolved from the following decisions:

Atchison, Topeka and Santa Fe Ry. v. Buell (1987), 480 U.S. 557, at 567, n.13, 107 S. Ct. 1410, at 1417, n.13.

In *Buell*, this Court recognized "unconscionable abuse" as a basis for recovery for a "purely" emotional injury.

Adams v. CSX Transportation, Inc., 899 F.2d 536 (6th Cir. 1990).

The *Adams* case required a showing of "unconscionable abuse" when using *Buell* as an authority for recovery in a purely emotional distress claim.

Consolidated Rail Corporation v. Gottshall (1994), 114 S. Ct. 2396, 129 L. Ed. 2d 427, at 443.

The *Gottshall* case more precisely defined the threshold requirements for a purely emotional F.E.L.A. distress

case, holding that under the "zone of danger" test, recovery for emotional injury is limited "to those plaintiffs who sustain a physical impact as a result of defendant's negligent conduct, *or* who are placed in immediate risk of physical harm by that conduct." *Gottshall*, supra, 114 S. Ct. at 2406, 129 L. Ed. 2d at 443. (Appx. A. 12)

On pages 6 and 7 of its petition for writ of certiorari, Conrail alluded to several acts of "unconscionable abuse" which met the "zone of danger" test:

1. Vance was threatened to be hit on the head with a steel-pointed "chipping" hammer by a fellow employee who was yelling, "You f . . . ing Erie guys have got to go." The attacker had raised the chipping hammer and had it in a position to bring it down on Vance's head when he was stopped by another person. Vance shook like a leaf for 10 minutes.

2. Another employee threatened and actually tried to run-over Vance with a company truck when he was working at night in the yards. The employee said that he just wanted to put a "scare" into Vance, which he did.

3. A former Penn Central employee tried to provoke a fight with Vance by shoving and taunting him.

In the *Adams* case, supra, 899 F.2d at 540, the U.S. Court of Appeals of the Sixth Circuit stated that with respect to a "purely" emotional distress injury:

> "We . . . hold that an employer has not breached its duty to provide an emotionally safe work place *unless* the employer (acting through its agents engages in 'unconscionable abuse' of an employee." (emphasis added)

In line with the *Adams* case, Conrail asserted on page 13 of its appellate brief to the Court of Appeals of Ohio (8th District) in the *Vance* case, that:

> "In order to establish the railroad's breach of its duty to provide an emotionally safe work place, plaintiff must show that the conduct complained of is 'outrageous' or constitutes 'unconscionable abuse."

The evidence of "unconscionable abuse" which included the above stated "zone of danger" incidents, went to the jury.

Conrail requested an "unconscionable abuse" instruction to the jury and it was given. The jury returned a general verdict for Vance.

The "unconscionable abuse" of Vance which included the incidents which met the "zone of danger" test, was the result of the pervasive, hostile work environment which Conrail permitted and perpetuated by its continuing negligence in not doing anything about it.

In this regard, the Court of appeals of Ohio in its November 10, 1993 Opinion in the *Vance* case found that:

> Testimony supported an overall atmosphere of animosity directed at former Erie employees by former Penn Central employees. The management of Conrail took *no action* to alleviate this hostility. (Appx. A. 40) (emphasis added).

The "unconscionable abuse" of Vance cumulatively caused him severe emotional distress for which he was diagnosed in August, 1987, as having a disabling, clinical depression. Conrail disqualified him from work.

Conrail's request for writ of certiorari should be denied because under the facts of this case; under F.E.L.A. statutory and common law; and especially under the law of the *Gottshall* case, the jury verdict and judgment for Vance is abundantly supported.

CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE SUPREME COURT OF OHIO IS IN ACCORD WITH THIS COURT'S "ZONE OF DANGER" TEST

A. As A Result Of A Hostile And Abusive Work Environment Which Was Negligently Permitted And Perpetuated By Conrail, Vance Was "Unconscionably Abused" At Work, Which Included Abusive Acts Which Met The *Gottshall* "Zone Of Danger" Test.

In this F.E.L.A. case, Conrail negligently permitted the existence of "unconscionable abuse" in the workplace environment which caused emotional distress, doing nothing to stop it.

Examples of the daily "unconscionable abuse" experienced by Vance which accompanied the constant hostility to which Vance was subjected, were set forth in Conrail's petition for writ of certiorari, at pages 6 and 7.

These examples included several incidents where Vance was put in immediate risk of physical harm, to wit: Vance was threatened to be hit on the head with a 10" long "chipping hammer" (Appx. B. 1): he was threatened to be run-over with a truck; and he was shoved in an effort to provoke him into an unwanted fight.

These incidents met the requirements of the "zone of danger" test.

In the *Vance* trial, Conrail requested and obtained an instruction to the jury that a finding of "unconscionable abuse" was a prerequisite of Vance being able to recover. (Appx. A. 32)

The jury returned a verdict for Vance and judgment was entered thereon. Vance had proved "unconscionable abuse" which included "zone of danger" acts.

B. Emotional stress from "Unconscionable Abuse" Which Vance Suffered Is Distinguishable From Normal Work-Related Stress For Which There Is No FELA Redress.

Non-actionable "work-related stress" is stress which arises "in the normal course of employment." *Gottshall*, supra, 129 L. Ed. 2d 427, at 449.

Emotional stress from continuous, "unconscionable abuse" which includes acts which meet this Court's *Gottshall* "zone of danger" test, is not stress which arises "in the normal course of employment," and the causes of the stress should not be blurred together merely because they originate at the work-place.

C. Conrail's Purported Authorities Are Not In Point With The *Vance* Case.

The cases cited by Conrail on page 16 of its petition for writ of certiorari as purported support for its argument, miss their mark as they do not mirror the vital facts of the *Vance* case.

The cited cases either do not relate to a disabling injury arising from a hostile and abusive work environment, and/or do not involve "unconscionable abuse," and/or do not meet the "zone of danger" threshold test.

Obviously, Conrail is attempting to compare apples, oranges, and peaches.

For example, Conrail attempts in support of its argument to utilize *Carlisle v. Consolidated Rail Corporation*, 790 F.Supp. 521 (E.D. Pa. 1992), rev'd and remanded, 114 S. Ct. 2396 (1994). However, this Court had pointed out in *Gottshall*, supra, 129 L. Ed. 2d 427, at 449, that:

> "Carlisle's work-stress-related claim plainly does not fall within the common law's conception of the zone of danger, and Carlisle makes no argument that it does. Without any support in the common law for such a claim, we will not take the radical step of reading FELA in the ordinary course of employment."

In contrast, *Vance* falls within the common law conception of the "zone of danger" and the harassment and "unconscionable abuse" suffered by Vance was not in the ordinary course of employment.

D. The Genuineness And Credibility Of A FELA Emotional Distress Claim Based On Negligence In Not Furnishing A Safe Place To Work, Is Placed In the Crucible When The Claim Is Submitted To The Jury.

Vance pled and proved examples of unconscionable abuse resulting from Conrail's continuing negligence in

not furnishing a safe place to work.[3] The unconscionable abuse of Vance which included those incidents which met the "zone of danger" test, caused a serious emotional stress injury to Vance which Conrail's expert witness referred to as an "incurable disease."

The cumulative effect of such stress was to disable Vance in August, 1987 from working thereafter.

In addition to *Vance* meeting the requirements of the "zone of danger" test, the seriousness of Vance's injury was acknowledged by Conrail in its opening statement to the jury. This amply satisfied the standard for sufficiency of proof of the genuineness and credibility of a FELA emotional distress claim.

The establishment of this standard was the major thrust of *Gottshall*.

Conrail has not cited any case with essentially the same, basic gravamen, facts and proven theory as *Vance* which conflicts with the Supreme Court of Ohio decision in *Vance*.

There is no justification for this Court to re-do its *Gottshall* "zone of danger" test as Conrail suggests.

E. Applicable Law

A carrier may be held liable for injury in the production of which is failure to exercise due care played any

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[3] Vance's unconscionable abuse reactions included: "shaking like a leaf", anxiety, hypertension, loss of weight, personality change, loss of self-esteem, memory lapses, nausea, vomiting, crying a lot, and feeling like a "zombie."

part, however slight. *Dennis v. Denver & R.G.W.R. Co.*, 375 U.S. 208, 11 L. Ed. 2d 256, 84 S. Ct. 291 (1963); *Gallick v. Baltimore & O.R. Co.*, 372 U.S. 108, 9 L. Ed. 2d 618 (1962).

A FELA case should go to the jury if a reasonable jury could find that the railroad's negligence played "any part, even the slightest," in producing the injury. *Rogers v. Missouri Pacific R.R. Co.* (1957), 352 U.S. 500.

A reversible error by the trial court does not occur in a FELA case unless there is a complete absence of probative facts to support the jury's conclusions. *Lavender v. Kurn* (1946), 327 U.S. 645.

With respect to procedural law in a case tried to a jury in an Ohio court, where there is only a general verdict with no written interrogatories to the jury, a reviewing court is authorized to infer that the jury found on all issues in favor of the successful [Vance] and against the unsuccessful, party [Conrail]. *Berisford v. Sells* (1975). 43 Ohio St. 2d 205, 72 O.O.2d 117, 331 N.E.2d 408.

Where the jury passed on questions relating to any inconsistencies in any testimony of plaintiff's witnesses and to the weight of evidence and credibility of witnesses, the reviewing court is bound by its decisions. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St. 2d 279, 376 N.E.2d 578.

The Supreme Court of Ohio did not err in affirming the jury verdict and judgment with respect to the issues presented to it.

CONCLUSION

Petitioner Conrail has failed to present any proposition of law which creates an actual conflict with the decision of the United States Supreme Court in *Gottshall*.

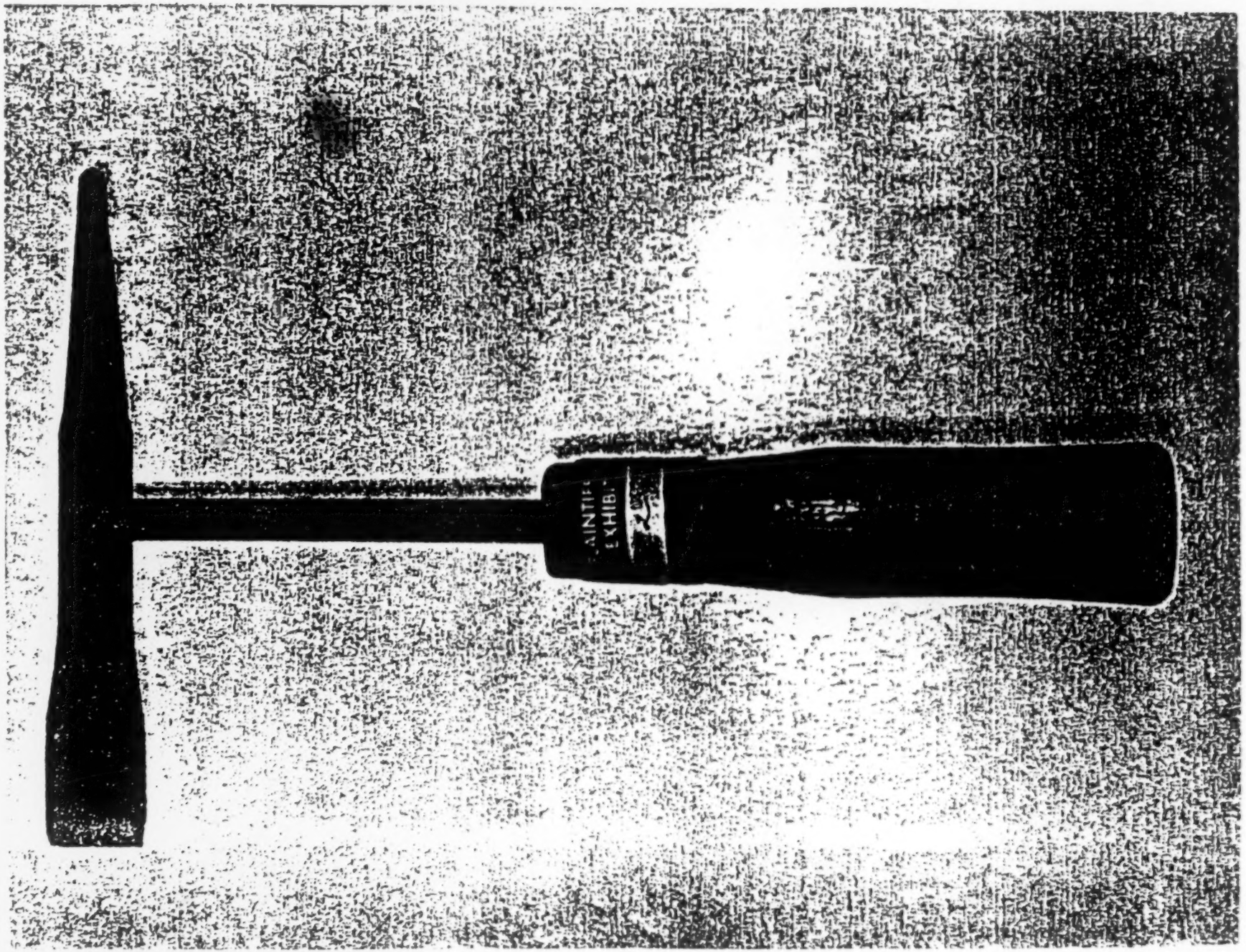
For that reason and the foregoing reasons, certiorari should be denied.

Respectfully submitted,

WALLACE R. STEFFEN
330 Standard Building
1370 Ontario Avenue
Cleveland, Ohio 44113
216/771-7171

Attorney for Respondent

APPENDIX "B.1"



APPENDIX "B.2"

FEDERAL EMPLOYERS' LIABILITY ACT
45 U.S.C. §51

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, *shall be liable in damages to any person suffering injury while he is employed by such carrier* in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, *for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier,* or by reason of any defect or *insufficiency,* due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, *or other equipment.*

* * *